IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 146 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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N B SURTI FAMILY TRUST - Applicant(s)

Versus

COMMISSIONER OF INCOME-TAX - Respondent(s)

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Appearance :
MR DK PUJ FOR MS NIYATI K SHAH for Applicant
MR BB NAIK for Respondent
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 06/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench “C” has referred the following question under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the assessee :

> “Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in rejecting the assessee's request of admitting in evidence the trust deed dated 4th April 1977 which was not filed at any earlier stage and was for the first time filed before the Tribunal on 16/8/1993?”

2. The assessment years involved are 1978-79 to 1982-83 and the relevant accounting periods are the financial years respectively. The assessee, a trust, filed returns of income on 31/3/1987, seeking benefit of the Amnesty Scheme, as popularly described. In the return of income, the status was shown by the assessee as an Association of Persons (specific trust). The assessing officer called upon the assessee to submit details on the following points :

> [1] When was the trust created?
>
> [2] What were its activities?, and

> [3] Whether the shares of the beneficiaries were specific and ascertainable?

Despite various opportunities granted, the assessee failed to either appear before the authority or submit any explanation. The assessing officer, therefore, assessed the assessee trust by assessment orders dated 22/6/1989 under Section 144 of the Act, by observing as under :

> “4. Since no Trust deed is available, it is difficult to verify whether there was any Trust at all and what were its purposes. It is not possible to verify what are the activities and whether the shares of the beneficiaries are specific and ascertainable.”

It was further observed that the benefit of the Amnesty Scheme was not available in absence of any proof to show that the assessee was a genuine trust.

3. The assessee carried the matter in appeal. The CIT (Appeals), by a consolidated order dated 31/8/1989, dismissed the appeals. While doing so, it was recorded

by the CIT (Appeals) as under :

> "He has given sufficient opportunity and has asked for the relevant details of the so-called trust deed. As it is evident that there was no such trust at all, naturally, the appellant could not produce the trust deed before him. The same condition continued before me also. It is to be noted that the appellant chose the relevant assessment years when he could have taken the benefits if the I.T.O. would not have asked for the relevant details. This shows that the appellant wanted to deliberately mislead the I.T.O. and submitted untrue statements of income."

4. The assessee carried the matter in second appeal before the Tribunal. On 16/8/1993, the assessee filed an affidavit dated 10th August 1993 claiming, *inter alia*, that the trust deed dated 4th April 1977 had since been traced and should be admitted by the Tribunal as evidence. After hearing the representative of both the sides, the Tribunal, by its impugned order dated 9/9/1993, came to the conclusion that this was not a fit case for admitting in evidence the trust deed, whose copy was filed before the Tribunal for the first

time on 16/8/1993.

5.Mr.D.K.Puj, the learned advocate appearing on behalf of the applicant assessee submitted that the Tribunal had erred in law by not recording any finding that the trust deed was not relevant or was not necessary for the purposes of deciding the appeal. That it was necessary for the Tribunal to record such a finding before rejecting the evidence. It was further submitted that the Tribunal ought to have remanded the matter to the lower authorities for the purposes of ascertaining genuineness of the document and could not have rejected the same without having the same verified. In support of his submissions, reliance was placed on the decision of this Court in case of Pari Mangaldas Girdhardas v. Commissioner of Income Tax, [1997] CTR (Gujarat) 647, and the decisions in case of R.S.S. Shanmugam Pillai & Sons v. Commissioner of Income Tax, Madras, [1974] 95 ITR 190 Madras and in case of Anaikar Trades and Estates (P) Ltd. (No.2) v. Commissioner of Income Tax, [1990] 186 ITR 313.

6.Mr.B.B.Naik, the learned standing counsel appearing on behalf of the respondent has relied upon the impugned

order of Tribunal to submit that there was no error and this Court should answer the question referred in favour of the revenue.

7. As the facts on record reveal, though the assessment years are 1978-79 to 1982-83, the returns were filed only in 1987. The said returns were not accompanied by any trust deed. As the said returns were filed for the first time, the assessing officer was justified in calling for the details, to ascertain, not only the genuineness of the trust, but also whether the trust was a specific trust or a discretionary trust. The nature of the trust could be determined only by considering the contents of the trust deed. The Tribunal has taken cognizance of the fact that the assessee not only chose to remain absent at the time of hearing, but did not produce any evidence despite being called upon to do so. As the record reveals, even summons under Section 131 of the Act had been issued and remained uncomplied with. It has been further found by the first appellate authority that even in the appeals before the authority, no document was placed on record.

8. Thereafter, when the appeals came up for hearing before the Tribunal, it is recorded by the Tribunal on the basis of its own record that the appeals had been filed on 06/12/1989 and the hearing had been adjourned on the request of the assessee twice, namely on 13/5/1993 and 17/6/1993. Ultimately, the hearing took place on 18/8/1993, but before that, as already noticed hereinbefore, the assessee for the first time filed an affidavit dated 10th August 1993 on 16th August 1993, seeking to produce the trust deed dated 4th April 1977. It is in the aforesaid backdrop of facts that the Tribunal has, while exercising discretion, come to the conclusion that this was not a case of additional evidence, but a case where no evidence had been filed and fresh evidence was sought to be adduced for the first time before the Tribunal. In this context, the Tribunal has also considered delay as a relevant factor and taken note of the fact that though the first accounting period was financial year 1977-78, the return had been filed only on 31st March 1987 and such return was not accompanied by the relevant trust deed, considering the fact that this was the first time the assessee was filing the return of income. The Tribunal has also, in the circumstances, come to the conclusion

that there was no reason shown why despite the appeal having been filed in 1989, the trust deed was produced only on 16/8/1993.

9. However, what is more fatal to the case of the assessee is the recording of fact in paragraph No.9 of the impugned order of Tribunal. It is found by the Tribunal that, before the CIT (Appeals), the statement of facts referred to a trust deed created in 1976 by a settlor, who is not the settlor insofar as the trust deed dated 4th April 1977 is concerned, a copy whereof was sought to be produced before the Tribunal. The findings of the Tribunal are in the following terms :

> “9. While still on this aspect, we may mention that in the statement of facts filed before the CIT(A), the opening part of the first sentence is as follows:
>
> `The appellant trust hereinafter referred to as appellant was created in 1976 by Narottambhai Bhagwanbhai Surti ......'
>
> Thus, it is specifically stated to have been created in 1976 and by Narottambhai

> Bhagwanbhai Surti. The copy of the trust deed produced before the Tribunal is dated 4th April 1977 and settled by Shri Bhagwandas Govindji Surti. These two discrepancies are visible at the very first sight."

10. It is apparent that, in the aforesaid factual matrix, the Tribunal was right in holding that this was not a case of additional evidence, but a case where no evidence had been produced before the assessing authority or the appellate authority and hence, was a case of fresh evidence before the Tribunal for the first time. Therefore, reliance on the decision of this Court in the case of Pari Mangaldas Girdhardas (supra), a decision which deals with Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963, cannot assist the case of the assessee.

11. The decision in case of R.S.S. Shanmugam Pillai & Sons (supra), with special reference to the observations made at page No.112 of the report, may be considered qua the facts of the case. It was held that the Tribunal was required to find that the evidence adduced at the stage of appeal was not quite relevant or that it was not necessary for the proper disposal of

the appeal and only in that case, the Tribunal could straightaway reject the evidence which was sought to be produced for the first time at the stage of appeal. These observations have been made in the context of the fact, as recorded by the Madras High Court, that the Tribunal in the case before the High Court on the one hand, came to the conclusion that the assessee was not justified in not producing the correspondence before the lower authorities and yet proceeded to take into consideration the contents of the correspondence to uphold the view expressed by the assessing officer.

12.In the present case, the Tribunal has not only not looked into the contents of the document, but categorically refused to admit the trust deed in evidence. The contention on behalf of the assessee that once the Tribunal had looked at the date of the trust deed, it would amount to considering the deed on merits, is misconceived. For the purposes of determining whether a document is relevant or not, all that the Tribunal has done is, look at the date of the deed in context of the averment made by the assessee in statement of facts before the Commissioner (Appeals). It is not even urged that the statement made by the

assessee in the statement of facts was incorrect in any manner whatsoever. Therefore, the Tribunal was justified in rejecting the application to admit the trust deed in evidence by considering this discrepancy as a relevant factor. As can be seen from the extract reproduced hereinbefore, may be the Tribunal has not categorically recorded that the document is not relevant, but in essence, that is the finding of the Tribunal. It is well established that the order of the Tribunal has to be read as a whole and one cannot pick up an expression of an opinion made incautiously to hang an issue of law.

13. The decision in case of Anaikar Trades and Estates (P) Ltd. (No.2) (supra) also cannot carry the case of the assessee any further inasmuch as, in the said decision, it has been found as a matter of fact that the evidence in form of affidavits at the earlier stages of the proceedings were available in a different section of the department, but were not made available to the assessing officer or the first appellate authority and such lapse was not deliberate. Therefore, the Madras High Court upheld the order of Tribunal admitting the additional evidence. Apart from the fact that the

present case is not a case of additional evidence, even on facts, in the present case, no evidence is forthcoming as to why the document was not produced either before the assessing authority or the appellate authority.

14.The Tribunal has approached the matter correctly by placing the burden on the assessee to substantiate its claim made in the return of income, namely, the nature of the trust being specific and not discretionary. The evidence in the form of trust deed would be in the possession of the assessee, namely, the trustees and in case the assessee fails to produce evidence in support of its claim, if the Tribunal in exercise of its discretionary powers appreciates the conduct of the assessee to arrive at a conclusion that the primary onus was not discharged and the assessee should not be permitted to undertake to discharge the same at a belated stage, no infirmity can be found in the order of the Tribunal.

15.Rule 18 of the Appellate Tribunal Rules requires filing of the documents or statements or other papers in the form of a paper-book within the prescribed

period. It is in this context that the Tribunal has observed that, despite the appeals having been filed on 16/12/1989, till 16/8/1993, no documents had been tendered by the assessee and no explanation was forthcoming for the delay.

16. In the circumstances, it is not possible to find any infirmity in the impugned order of Tribunal passed in exercise of its discretion. The Tribunal was right in law in rejecting the assessee's request of admitting in evidence the trust deed dated 4th April 1977 which was not filed at any earlier stage and was for the first time filed before the Tribunal on 16/8/1993.

17. The question is accordingly answered in the affirmative i.e. in favour of the revenue and against the assessee.

18. The reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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